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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 589

JAMES G. McCONKEY and CLAUDINE W. McCONKEY,
Husband and Wife, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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February 6, 1953

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case November 10, 1952.

Opinions Below

The Opinion of the Court of Appeals (R. 18) is reported at —— F. (2d) ——. There was no Opinion in the Tax

Court. The Order of the Tax Court granting respondent's motion to dismiss appears in the Record at page 14.

Jurisdiction

The jurisdiction of the Supreme Court to review this case rests upon 27 U.S.C. § 1254(1).

Question Presented

Have the taxpayers a right of appeal to the Tax Court of the United States when the Commissioner of Internal Revenue issues a notice of deficiency which determines there is a deficiency in taxes due from the petitioner?

The Internal Revenue Code, Sec. 272, says the taxpayer has such a right. The two lower courts say that if the Commissioner was in error in issuing the notice of deficiency, the Tax Court does not have jurisdiction.

Statutes Involved

Statutes Involved appear in the Appendix, page 9 hereof.

Statement of the Facts

During 1950 a Revenue Agent examined the 1947 income tax return of the petitioners and tentatively proposed a deficiency in tax of $11,277.46. November 4, 1950, petitioner James G. McConkey, wrote the Collector telling of the Agent's action and enclosing a check in order to stop the running of interest "on the possible additional taxes while the case is in litigation." In addition to paying the proposed deficiency in tax for 1947, petitioner, James G. McConkey, on the same date also paid some additional sums for 1948 and 1949 based upon the same possible adjustments to income for those years as the Revenue Agent had proposed for 1947. (R. 1)

March 14, 1951, petitioner James G. McConkey made a similar payment of $2,000.00 on account of possible adjustments to 1950 income. (R. 2)

The amounts so paid were accepted by the Collector and treated as "Payments in Suspense." (R. 3)

April 25, 1951, a notice of deficiency determining a deficiency for 1947 in the amount of $11,277.46 was mailed to petitioners. (R. 8)

The said notice advised petitioners of their right of appeal to the Tax Court, in the following language (R. 8):

> "You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of $11,277.46, as shown in the statement attached.
>
> "In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.
>
> "Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C. for a redetermination of the deficiency or deficiencies."

May 28, 1951, petitioners filed a petition with the Tax Court, contesting the correctness of the determination of the deficiency in the notice of deficiency. (R. 4)

November 7, 1951, respondent filed a motion to dismiss on the ground that the deficiency had been paid prior to the mailing of the notice of deficiency. (R. 13)

April 7, 1952, the Tax Court ordered that the motion to dismiss be granted. (R. 14)

November 10, 1952, the Fourth Circuit affirmed the Tax Court. (R. 18)

Specification of Error to be Urged

The Court of Appeals erred in holding that the Tax Court had no jurisdiction of a proceeding filed by these taxpayers contesting a determination that the petitioners owed a deficiency in tax, as set forth in a notice of deficiency.

Reasons for Granting the Writ

I.

This is a simple case involving simple uncontested facts and plain statutory language.

The statute[1] says that if the Commissioner determines there is a deficiency in tax due from any taxpayer, he shall send notice of such deficiency to the taxpayer. The same Code section says that if the taxpayer disagrees with the Commissioner's determination, he may appeal to the Tax Court. This right of appeal exists even if the Commissioner was in error in determining the deficiency. This must be true because in cases appealed to the Tax Court the Commissioner is sustained with respect to only about 50 percent of the asserted deficiencies.[2]

Despite the clear, easily understood language of the statute, the Tax Court and the Court of Appeals say this language is to be disregarded because it appears that the Commissioner made a mistake when he made the determination that these taxpayers owed a deficiency in tax.

To put it another way, the lower courts say that, even though all the requirements of Tax Court jurisdiction have been met, the Tax Court does not have jurisdiction because the Commissioner should never have taken the jurisdictional step of determining the deficiency in tax.

Such a position does violence to the established law that jurisdictional statutes must be strictly construed.

II.

The decision below is in conflict with long established law. In *H. Milgrim & Bros., Inc.*, 24 B.T.A. 853 (1931), the Board of Tax Appeals (now the Tax Court) announced the rule that if the Commissioner determines a deficiency,

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[1] See. 272, Internal Revenue Code, page 9 hereof.

[2] Report of Commissioner of Internal Revenue for fiscal year ended June 30, 1951, page 67.

even if the Commissioner is in error, the Board of Tax Appeals (now the Tax Court) has jurisdiction. The Board states (p. 854):

> "It may well be true that the respondent erred in his determination that a deficiency existed for this period. But once he determined that there was a deficiency, that fact gives us jurisdiction to determine whether or not it was correctly arrived at."

The Circuit Court of Appeals passes over the *Milgrim* case by saying that it contains general language tending to sustain the contentions of the petitioner, but says it does not contain any adequate discussion and no supporting cases are cited.

Despite the criticism of the *Milgrim* decision, the Fourth Circuit found no difficulty in relying upon *Anderson* v. *Commissioner*, 11 T.C. 841, a case in which neither the taxpayer nor his attorney appeared at the hearing. Also, there was no adequate discussion in the *Anderson* case. In disposing of the *Anderson* case, the Tax Court relied upon *Everett Knitting Works*, 1 B.T.A. 5, and *Will County Title Co.*, 38 B.T.A. 1396. Neither case is applicable. In the *Everett* case no deficiency was determined. In the *Will County* case, the Commissioner determined an overpayment and not a deficiency in excess profits tax.

The Circuit Court attempts to distinguish the case of *C. A. O'Meara*, 11 B.T.A. 101, (1928), relied upon by the taxpayers. The fact is that the Board of Tax Appeals considered the issue to be the same as in the case at bar. The Board states:

> "The first reason overlooks the statutory provision that jurisdiction is conferred on the Board in any case in which the Commissioner determines a deficiency and an appeal is duly filed with the Board (section 274, Revenue Act of 1926). Whether or not the deficiency as determined is correct, it is the function of the Board to determine, but the fact that upon examination by the Board it is determined that the deficiency which the

> Commissioner determined was erroneous to the extent that no deficiency in fact exists, will not oust the Board of its jurisdiction. * * * The establishing of the facts contended for by this petitioner would serve to extinguish the deficiency and show an overpayment, but it would not alter the fact that in the first instance the Commissioner had determined a deficiency."

III.

In many cases taxpayers, after appealing to the Tax Court, pay the asserted deficiency to stop the running of interest, or because they then have the money to pay and may not have it when the case is finally decided. In those cases the Tax Court has retained jurisdiction. *DeSabichi* v. *Commissioner*, 4 B.T.A. 445 (1926). If the reasoning in the case at bar is correct, the Tax Court will lose jurisdiction because, in fact, there will be no deficiency in the amount asserted by the Commissioner. Such cannot be the rule because the Internal Revenue Code specifically provides[3] that the Tax Court may determine overpayments as well as deficiencies in respect of a taxable year for which the Commissioner has determined a deficiency.

IV.

The right of appeal to the Tax Court is a valuable right which should not be lightly taken away from taxpayers. This is true because a trial before the Tax Court is a trial *de novo* in which the taxpayer may present any question relating to his tax liability. In one of its first decisions, the Board of Tax Appeals stated in *E. J. Barry*, 1 B.T.A. 156 (1922):

> "When a taxpayer brings his case before the Board he proceeds by trial *de novo*. The record of the case made in the Internal Revenue Bureau is not before the Board except in so far as it may be properly placed in evi-

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[3] See Sec. 322(d), Internal Revenue Code, page 10 hereof.

dence by the taxpayer or by the Commissioner. The Board must decide each case upon the record made at the hearing before it, and, in order that it may properly do so, the taxpayer must be permitted to fully present any questions relating to his tax liability which may be necessary to a correct determination of the deficiency. To say that the taxpayer who brings his case before the Board is limited to questions presented before the Commissioner, and that the Board in its determination of the case is restricted to a decision of issues raised in the Internal Revenue Bureau would be to deny the taxpayer a full and complete hearing and an open and neutral consideration of his case."

An additional valuable right is that the statute specifically provides that if the Commissioner has mailed a notice of deficiency, he has no right to determine a second deficiency for the same year.[4] If the notice here involved is invalid, this limitation on the Commissioner is not applicable.

If the rule of the case at bar is permitted to stand, taxpayers similarly situated will not take the chance of appealing to the Tax Court, but will file claims for refund and sue in the United States District Courts. This will increase the already crowded dockets and workloads of the District Courts. One of the reasons for the creation of the Tax Court was to relieve the District Courts of the burden of disposing of complicated tax cases.

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[4] Sec. 272(f), Internal Revenue Code App., page 11 hereof. See also *McCue* v. *Commissioner*, 1 T.C. 986 (1943); *American Foundation*, 2 T.C. 502(1943).

Conclusion

This cases involves an important question of Federal law which affects many taxpayers and which has been decided contrary to statute and to established law. This Court should settle the issue and eliminate the confusion which will result from the decision in the case at bar.

Respectfully submitted,

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February 6, 1953

Appendix

Internal Revenue Code:

"Sec. 272, PROCEDURE IN GENERAL.

"[(a)(1) Petition to The Tax Court of the United States.]

"If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * * "

"Sec. 271. DEFINITION OF DEFICIENCY.

"(a) In general.—As used in this chapter in respect of a tax imposed by this chapter, 'Deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—

"(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

"(2) the amount of rebates, as defined in subsection (b)(2), made."

"Sec. 322(c). EFFECT OF PETITION TO TAX COURT.

"If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with The Tax Court of the United States within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

"(1) As to overpayments determined by a decision of the Tax Court which has become final; and

"(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

"(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive."

"Sec. 322(d) OVERPAYMENT FOUND BY TAX COURT.

"If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *"

"Sec. 272(f) FURTHER DEFICIENCY LETTERS RESTRICTED.

"If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section, relating to assertion of greater deficiencies before the Tax Court, or in section 273(c) relating to the making of jeopardy assessments. * * * "

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 589

JAMES G. MCCONKEY AND CLAUDINE W. MCCONKEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 18-22) is reported at 199 F. 2d 892. The Tax Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals (R. 22-23 was entered on November 10, 1952. The petition for a writ of certiorari was filed on February 6, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Tax Court had jurisdiction to review the action of the Commissioner of Internal Revenue in purporting to assert a deficiency in income tax against taxpayers where the amount proposed as a deficiency had in fact been paid to the Collector of Internal Revenue, without assessment, prior to the date on which the Commissioner's statutory notice was mailed.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 271 [as amended by Sec. 14(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. DEFINITION OF DEFICIENCY.
>
> (a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—
>
> (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b)(2), made.
>
> (b) *Rules for Application of Subsection (a).*—For the purposes of this section—
>
> (1) The tax imposed by this chapter and the tax shown on the return shall both be

determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in Section 143(a):

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a) (1) over the amount of rebates previously made; and

* * * * *

(26 U.S.C. 1946 ed., Sec. 271.)

SEC. 272 [as amended by Sec. 168(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 203(a) of the Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax im-

posed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred fifty days in lieu of ninety days.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

STATEMENT

This case was decided by the Tax Court on the respondent's motion to dismiss (R. 14-15). The facts, as stated in the opinion of the Court of Appeals (R. 18-19), may be summarized as follows:

This proceeding involves the federal income tax liability of James G. McConkey and his wife, Claudine W. McConkey, for the calendar year 1947. After an internal revenue agent had tentatively proposed a deficiency in tax against the taxpayers for 1947 they paid to the Collector of Internal Revenue the amount of the tentative deficiency, with interest. The payments were accepted by the Collector as "Payments in Suspense". (R. 1-2, 3, 18). Subsequent to the payments mentioned the Commissioner sent the taxpayers what purported to be a statutory notice of deficiency pursuant to Section 272(a) of the Internal Revenue Code, asserting a deficiency in tax in the amount found by the Internal Revenue agent, and advised the taxpayers of their right to appeal to the Tax Court. (R. 8-11). The taxpayers took a timely appeal to the Tax Court. (R. 4-8.)

No assessment of the tax had been made prior to the time the money was paid to the Collector, at the time the notice of deficiency issued, or at the time the appeal was taken to the Tax Court. (R. 19.) The Commissioner moved to dismiss the appeal on the ground that since the full amount due had been paid prior to the mailing of the notice of deficiency, there was no deficiency in tax, and the Tax Court was therefore without jurisdiction. (R. 13-14, 19.) The Tax Court granted the motion to dismiss (R. 14-15, 19), and the Court of Appeals affirmed (R. 18-22).

ARGUMENT

1. Petitioners' contention (Pet. p. 6) that the decision of the court below "is in conflict with long-established law" is without merit. The precise question presented here was decided adversely to petitioners' contention by the Tax Court in *Anderson* v. *Commissioner*, 11 T.C. 841, which the court below cited with approval (R. 21). The cases of *H. Milgrim & Bros., Inc.* v. *Commissioner*, 24 B. T. A. 853, and *O'Meara* v. *Commissioner*, 11 B. T. A. 101, relied upon by petitioners, contain general statements to the effect that the mere fact that the Commissioner's determination is erroneous will not oust the Board (now the Tax Court) of jurisdiction. But those cases involved consolidated returns and cannot be properly said to have established law which applies to the factual situation presented in the instant case.

2. Petitioners contend, in effect, that the court below erred in holding that the Tax Court had no jurisdiction, since they filed a proceeding in that court based on a notice by the Commissioner that they owed a deficiency in tax, notwithstanding the fact that the amount in issue had already been placed in the Collector's hands (Pet. p. 3). But their contention disregards both the basic purpose for which the Board of Tax Appeals (now the Tax Court) was created and the definition of the term "deficiency" established by Congress. The purpose for which the Board was established was to provide a forum where taxpayers could obtain a judicial determination of their liability for the

particular year or years involved in advance of payment of any "deficiency" asserted against them. *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716, 721; H. Rep. No. 179, 68th Cong., 1st Sess., p. 62 (1924) (1939-1 Cum. Bull. (Part 2) 241, 258); S. Rep. No. 398, 68th Cong., 1st Sess., p. 30 (1924) (1939-1 Cum. Bull. (Part 2) 266, 287); H. Rep. No. 1, 69th Cong., 1st Sess., p. 10 (1925) (1939-1 Cum. Bull. (Part 2) 315, 321-322); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25-28 (1926) (1939-1 Cum. Bull. (Part 2) 332, 351-353). Compare *Phillips* v. *Commissioner,* 283 U. S. 589.

A "deficiency" for the purpose of the provision of law conferring jurisdiction on the Tax Court is defined in Section 271(a) of the Code, *supra,* p. 2. As the court below pointed out (R. 19), so far as this case is concerned, a "deficiency" within the meaning of Section 271 "would be the excess of the correct tax due, as determined by the Commissioner, over the amount shown on the return plus any amounts previously assessed or collected without assessment." Here, there was, of course, no such excess amount due from the taxpayers. Hence, in fact and in law, there was no "deficiency" and the Commissioner's action in purporting to determine a deficiency was nugatory. Petitioners' argument that the jurisdiction of the Tax Court should be predicated solely on the Commissioner's "notice of deficiency" even though the tax liability determined by the Commissioner in his "notice" corresponded exactly with the liability shown on the return plus the amount sub-

sequently collected without assessment is clearly not in harmony with Section 272(a)(1) of the Internal Revenue Code, *supra*, pp. 3-4.

By giving taxpayers the alternative remedy of proceeding in the Tax Court, Congress did not infringe upon their right to pay any additional tax assessed against them and sue for a refund in a United States District Court or other proper federal court. The new remedy was merely cumulative. If a taxpayer chooses to pay any additional amount proposed to be assessed against him as a deficiency, as was done in this case, before the Commissioner has made an official determination that there is a deficiency, he has forfeited the statutory remedy afforded him of proceeding in the Tax Court, and has instead elected to pursue the alternative remedy of payment and suit for refund. Upon payment in advance of the Commissioner's determination the very basis of his right to proceed in the Tax Court has ceased to exist. The Court of Appeals rightly said (R. 22) that in such circumstances a taxpayer may not compound these two mutually independent procedures by taking a part of one procedure and a part of the other. In other words, he cannot pay the tax, and then, upon an erroneous determination of a deficiency by the Commissioner, where there is in fact no deficiency because the full amount has been placed in the hands of the Collector, seek a review by the Tax Court.

3. Petitioners assert (Pet. 6) that the reasoning

of the court below applied equally to cases where taxpayers, in order to save interest, elect to pay the deficiency after appealing to the Tax Court, and that the Tax Court in such cases necessarily would lose jurisdiction because of that fact. This assertion fails to take into account the statutory provisions relating to the jurisdiction of the Tax Court. Section 272(a)(1), *supra*, pp. 3-4, of the Internal Revenue Code requires the Commissioner to first send a notice of deficiency, except in cases of jeopardy, and prohibits him from assessing and collecting the deficiency for 90 days thereafter during which time the taxpayer may appeal to the Tax Court. If a timely petition is filed with the Tax Court the prohibition against assessment and collection is continued until after the decision of the Tax Court has become final. Subsection (d) of Section 272, however, provides that the taxpayer "shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency", and under Section 292(a) of that Code interest on any amount with respect to which the taxpayer has filed such a waiver can be charged only to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is earlier. If a timely petition is filed and the Tax Court at once acquires jurisdiction, it will not lose jurisdiction upon the filing of a waiver

under Section 272(d) and payment of the deficiency. See *De Sabichi* v. *Commissioner*, 4 B.T.A. 445.

CONCLUSION

The decision of the Court of Appeals is correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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